Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

GEOSOUTHERN ENERGY CORP.
and AMERICAN FLUORITE, INC.,

Petitioners,

v.

CHESAPEAKE OPERATING INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

1. Whether Rule 56 of the Federal Rules of Civil Procedure permits the court in a non-jury case to resolve a summary judgment by expressly drawing inferences from the evidence in favor of the movant on the theory that the court is the ultimate finder of fact in non-jury cases.

2. Whether due process requirements permit the court in a non-jury case to resolve a summary judgment in favor of the movant by expressly drawing inferences from the evidence in favor of the movant on the theory that the court is the ultimate finder of fact in non-jury cases.

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioners: GeoSouthern Energy Corporation and American Fluorite, Inc., nongovernmental corporate parties to the proceedings before the United States District Court for the Southern District of Texas and the United States Court of Appeals for the Fifth Circuit.

GeoSouthern Energy Corporation discloses that it is a Texas corporation, it has no parent corporations, and there are no publically held corporations which own ten percent or more of its stock. American Fluorite, Inc. discloses that it is a Texas corporation, it has a parent corporation, US Exploration, which is a Mississippi corporation, and there are no publically held corporations which own ten percent or more of American Fluorite, Inc.'s stock.

Respondent: Chesapeake Operating, Inc., a nongovernmental corporate party to the proceedings before the United States District Court for the Southern District of Texas and the United States Court of Appeals for the Fifth Circuit.

Chesapeake Operating, Inc. is a subsidiary of Chesapeake Energy Corporation, a publically traded corporation (NYSE symbol, CHK). Chesapeake Operating, Inc. has represented that Chesapeake Energy Corporation owns ten percent or more of the stock of Chesapeake Operating, Inc.

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OPINIONS BELOW

This declaratory judgment case was filed in the United States District Court for the Southern District of Texas. Petitioners and Respondent filed cross motions for summary judgment on Petitioners' claims and Respondent's counter-claims.

On April 15, 1999, the district court entered a Memorandum Opinion and Order on the parties' respective summary judgment motions. On July 27, 1999, the district court entered an Amended Final Judgment in favor of Respondent on its motion for partial summary judgment on count 1 of its counter-claim and its cross motion for summary judgment on counts 2, 3 and 4 of its counter-claim. The district court's opinion was appealed to the United States Court of Appeals for the Fifth Circuit. On February 1, 2001, the Fifth Circuit dismissed the appeal for want of jurisdiction.

On February 27, 2001, the district court entered an order certifying the July 27, 1999 Amended Final Judgment for appeal under Rule 54(b) of the Federal Rules of Civil Procedure. The opinion of the district court was appealed to the Fifth Circuit a second time and, on December 13, 2001, the Fifth Circuit issued an opinion affirming the judgment of the district court. On February 1, 2002, the Fifth Circuit denied Petitioners' timely-filed petition for rehearing.

The December 13, 2001 Fifth Circuit opinion is published in the Federal Reporter as *GeoSouthern Energy Corp. v. Chesapeake Operating, Inc.*, 274 F.3d 1017 (5th Cir. 2001).

JURISDICTION

Subject matter jurisdiction for the United States District Court for the Southern District of Texas is founded upon diversity under 28 U.S.C. § 1441. Subject matter jurisdiction for the Court of Appeals for the Fifth Circuit was invoked under 28 U.S.C. § 1441 and Rule 54(b) of the Federal Rules of Civil Procedure.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Rule 56 of the Federal Rules of Civil Procedure:

Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Due Process Clause of the Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This is a dispute over rights in a number of oil and gas properties located in Fayette, Burleson, Washington, Lee and Brazos counties in Texas. Petitioners and Respondent are parties to certain joint development and operating agreements which define their rights in these oil and gas properties (the "Agreements"). Petitioners instituted a

declaratory judgment suit against Respondent in the United States District Court for the Southern District of Texas; and thereafter Respondent filed counter-claims for declaratory judgment and for an accounting. Petitioners and Respondent sought an interpretation of and a judicial declaration concerning their rights under the Agreements on cross motions for summary judgment filed under the authority of Rule 56 of the Federal Rules of Civil Procedure. Neither Petitioners nor Respondents requested a jury in accordance with Rule 38 of the Federal Rules of Civil Procedure.

In reviewing the parties' cross motions for summary judgment, the district court erred in departing from standard summary judgment procedure and the requirements of Rule 56. Apx. 15a. In reviewing the district court's summary judgment order, the Fifth Circuit compounded the error by applying a wholly different standard of review for summary judgments granted in jury cases from those granted in non jury cases. Apx. 5a. Specifically, the Fifth Circuit adopted a standard of review in non jury cases which expressly allows the trial court to make inferences from the summary judgment evidence in the *movant's* favor. *Id.* This new standard of review violates the non movant's right to due process and ignores the plain language of Rule 56.

REASONS FOR GRANTING WRIT

The Fifth Circuit and the district court erred in applying different standards of review for summary judgments in non jury cases than those employed in jury cases. As the Fifth Circuit explained,

> GeoSouthern complains that the district court applied the incorrect standard for summary judgment herein. After discussing the traditional standard, the trial court noted our articulation of the summary judgment standard applicable to those issues which are to be decided by the court in a non jury trial. We observed in *Nunez v. Superior Oil Co.*,

> [572 F.2d 1119 (5th Cir. 1978),] that when "the evidentiary facts are not disputed, a court in a non jury case may grant summary judgment if trial would not enhance its ability to draw inferences and conclusions." In a non jury trial, the judge is the ultimate trier of fact, and properly exercises judicial discretion by drawing inferences from evidence without resort to trial in instances such as are herein presented.

Apx. 4a–5a. As other circuit courts of appeals have observed, this standard of review employed in the Fifth Circuit is that "in a non jury case . . . the [district] court can draw inferences in favor of the party moving for summary judgment." *Hamilton v. Prudential Ins. Co. of America*, 908 F.2d 967, 1990 WL 101366, at *3 (4th Cir. 1990) (unpublished decision declining to decide whether the Fourth Circuit would adopt the Fifth Circuit's standard of review). The Fifth Circuit's standard, permitting inferences from the summary judgment record to be drawn in the *movant's* favor, is contrary to this Court's interpretation of Rule 56 of the Federal Rules of Civil Procedure and violates the non movant's due process rights under the Fifth Amendment to the United States Constitution.

It is well-established that summary judgment is only appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. This Court's interpretation of summary judgment procedure in general and Rule 56 in particular has uniformly been that inferences from the summary judgment evidence should be made in the non movant's favor. In *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999), the Court observed that "in ruling on a motion for summary judgment, the non moving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.'" (Citations omitted). Similarly, in *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), the Court

held that "[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." Moreover, as this Court explained in *General Electric Co. v. Joiner*, 522 U.S. 136, 143 (1997), "[o]n a motion for summary judgment, disputed issues of fact are resolved against the moving party[.]" Petitioners have been unable to uncover a single case before this Court departing from the rule that inferences from the summary judgment evidence should be made in the non movant's favor or the rule that facts should be construed in the light most favorable to the non movant.

In sharp contrast to the uniform summary judgment procedure enunciated by this Court which is described above, in this case the Fifth Circuit has created confusion and unpredictability in summary judgment practice. The Fifth Circuit's only justification for departing from the traditional standard of review in non jury cases is that since the trial court is the ultimate fact finder it should be able to make inferences from the evidence in the movant's favor since it may do so at the eventual trial. Apx. 5a. The implicit rationale of the Fifth Circuit's opinion is that since the district court will be permitted to make inferences from the evidence at the trial, it is in the interest of judicial economy to allow it to do so at the summary judgment stage. *Id.* Although the Fifth Circuit's logic is superficially appealing, it loses any such appeal on a more detailed analysis.

The Fifth Circuit's summary judgment standard of review for non jury cases violates the dictates of Rule 56 and the uniform interpretation this Court has given with respect to summary judgment procedure discussed above. It is plain error for the Fifth Circuit to depart from this Court's longstanding summary judgment procedure and the Court should grant this Petition for this reason alone. Moreover, allowing the district court to resolve inferences from the evidence in the movant's favor at the summary judgment stage, as it may be permitted to do at trial, is contrary to the justifiable expectations of the non movant and, concomitantly, the meaningful right of the non movant to be

heard. The non movant justifiably expects that the district court will not resolve factual inferences from the evidence in favor of the movant. The non movant also justifiably expects that it need not marshal the same evidence for the summary judgment stage that it would for trial.

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law[.]" U.S. Const., Amdt. 5. "The core of due process is the right to notice and a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). As the Court recently explained in *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000), "[t]he Federal Rules of Civil Procedure are designed to further the due process of law that the Constitution guarantees." Thus, this Court has recognized that a violation of the rules of procedure is the kind of error that may deny a litigant its right to due process. That is precisely what has happened in this case.

The Fifth Circuit's opinion denies litigants, such as Petitioners, the right to notice and a meaningful opportunity to be heard in summary judgment practice. Summary judgment works because of predictable rules which allow trial courts to "isolate and dispose of factually unsupported claims or defenses[.]" *Celotex Corporation v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is not the same as trial, however. One of the most notable differences is that one traditionally need not marshal all of one's evidence at the summary judgment stage. *Id.* Litigants, such as Petitioners, depend upon the rules of summary judgment procedure, such as the rule that all inferences from the evidence are to be made in the non movant's favor, in determining how and to what extent to respond to a summary judgment motion.

Although Petitioners' claims and Respondent's counter-claims were ostensibly resolved by summary judgment, in reality they were resolved at a summary trial held *sua sponte* by the district court. In terms of the standard of review employed by the district court and the Fifth Circuit, and the treatment of the evidence, it cannot be said that the parties'

respective claims and counter-claims were resolved by summary judgment. Inferences from the summary judgment evidence were made not in the non movant's favor, but rather in favor of the movant. No prior notice was given to the Petitioners that traditional summary judgment procedure would be ignored. No prior notice was given that a summary trial with the trial judge weighing the evidence was to take place. In short, the proceeding before the district court, which was blessed by the Fifth Circuit, was a summary judgment in name only. Under these circumstances, the Fifth Circuit's rule, and the district court's execution of that rule, have not merely eviscerated Rule 56, but have violated Petitioners' most basic due process rights protected by the Fifth Amendment.

CONCLUSION

THEREFORE, Petitioners GeoSouthern Energy Corporation and American Fluorite, Inc. request of this Court that it grant their Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 01-20249 Summary Calendar

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GEOSOUTHERN ENERGY CORP.,
Plaintiff-Counter Defendant-Appellant,

and

AMERICAN FLOURITE INC.,
Counter Defendant-Appellant,

versus

CHESAPEAKE OPERATING INC.,
Defendant-Counter Claimant-Appellee.

December 13, 2001, Decided

COUNSEL:
For GEOSOUTHERN ENERGY CORP, Plaintiff - Counter Defendant - Appellant: Gregory Neill Jones, Jeffrey D Meyer, Franklin, Cardwell & Jones, Houston, TX.

For AMERICAN FLOURITE INC, Counter Defendant - Appellant: Gregory Neill Jones, Jeffrey D Meyer, Franklin, Cardwell & Jones, Houston, TX.

For CHESAPEAKE OPERATING INC, Defendant - Counter Claimant - Appellee: Jesse R Pierce, Clements, O'Neill, Pierce, Nickens & Wilson, Houston, TX.

JUDGES:
Before POLITZ, SMITH and BARKSDALE, Circuit Judges.

OPINION BY:
POLITZ

OPINION:

POLITZ, Circuit Judge:

GeoSouthern Energy Corporation appeals an adverse summary judgment denying its claim for reformation of a joint development agreement related to certain oil and gas leases, and granting declaratory and other relief to Chesapeake Operating, Inc. We affirm.

BACKGROUND

In 1991, Chesapeake, GeoSouthern, and American Fluorite, Inc.,[1] entered into a Joint Development Agreement under which Chesapeake was to drill oil and gas wells on mineral leases owned by GeoSouthern. The parties engaged in extensive negotiations and revisions of this 1991 Agreement. Chesapeake was represented by an attorney throughout the negotiations; GeoSouthern was represented by its president, acting without the assistance of counsel.

Under the 1991 Agreement, certain oil and gas Properties listed in the agreement were to be made available for development. Land selected from the Properties for proposed wells was referred to in the 1991 Agreement as a Horizontal Prospect. If one of the parties to the agreement proposed developing all or part of an included Property, the other party could then elect to participate. Under the terms of the 1991 Agreement, GeoSouthern, as owner of the Properties, would assign a working interest in the Horizontal Prospect to Chesapeake. Thereafter, if the well on the Horizontal Prospect became noncommercial for sixty days or more, GeoSouthern had a right under the 1991 Agreement and assignments to compel reassignment of Chesapeake's rights.

Most of the Horizontal Prospects encompassed approximately 160 acres, however, two units were significantly larger. The parties agreed that these two units, Abbie 1-H (Abbie Well) and Neidra 1-H (Neidra Well), would be assigned to Chesapeake with GeoSouthern retaining the right to reassignment of the excess acreage.

In 1993 the parties amended the 1991 Agreement and entered into a separate Joint Development Agreement with

Union Pacific Resources Corporation. The 1993 Agreement covered several, but not all, of the properties included in the 1991 Agreement. While the 1991 Agreement applied only to listed Properties, the 1993 Agreement applied to a "Joint Development Area" defined geographically on a map. Upon execution of the 1993 Agreement, the 1991 Agreement was suspended as to Properties located within the Joint Development Area during the term of the 1993 Agreement,[2] and was terminated as to Properties outside the Joint Development Area unless they were listed in Schedule F of the 1993 Agreement.

Three separate disputes later arose. The first dispute concerns the Victoria OL No. 1 Well. GeoSouthern proposed the Victoria Well as a Horizontal Prospect. Nineteen days after GeoSouthern notified Chesapeake of its designation of the Victoria Well as a Horizontal Prospect, Chesapeake elected to participate. GeoSouthern denied participation, claiming that Chesapeake's election was untimely. The 1991 Agreement provides that after receiving notice of designation by GeoSouthern Chesapeake must notify GeoSouthern of its election to participate "in writing . . . not less than fifteen (15) days after receipt of such notice." GeoSouthern claims that the parties intended that the election was to be made within fifteen days after receipt of notice, despite the literal language of the contract, and sought reformation of the contract. Chesapeake asserts that the literal language of the 1991 Agreement expressed the mutual intent of the parties. The district court granted Chesapeake's motion for summary judgment, holding that Chesapeake's response was timely and entitled Chesapeake to an interest in the Victoria Well, and entered a further declaratory judgment that GeoSouthern was not entitled to reformation.

The second dispute arises from the Brangus 1-H Well. Following the initial assignment, this well became noncommercial for at least sixty days and GeoSouthern compelled reassignment of Chesapeake's interest under the terms of the 1991 Agreement. GeoSouthern later developed a new well, Brangus No. 1-RE, which included the acreage from the earlier Brangus Well, plus additional acreage. Chesapeake claims it is entitled to participate in the second Brangus Well

on a reduced percentage basis on the theory that the underlying leases it reassigned to GeoSouthern are still Properties under the 1991 Agreement. The district court granted Chesapeake's motion for summary judgment, awarding it a proportional interest in the second Brangus Well, as well as in "other wells which were the result of Horizontal Prospects under the 1991 [Agreement] and were reassigned to GeoSouthern in accordance with the provisions in the 1991 [Agreement] regarding wells which were noncommercial for at least sixty days."

The third dispute involves the Abbie Well and Neidra Well. The excess acreage from these wells was reassigned to GeoSouthern. Subsequently, GeoSouthern used acreage from these units to create a new well, the Helene No. 1-RE Well. Chesapeake claims it is entitled to participate in the Helene Well on a reduced percentage basis on the grounds that it is comprised of portions of the Abbie Well and Neidra Well. The district court granted Chesapeake's motion for summary judgment awarding it a prorated interest in the Helene Well.

ANALYSIS

I. Summary Judgment Standard:

We review the district court's grant of summary judgment de novo.[3] Summary judgment is proper when there is no genuine issue as to any material fact.[4] A factual issue is material if its resolution could affect the outcome of the action.[5] In determining whether there is a genuine issue as to any material fact, all justifiable inferences will be made in the nonmoving party's favor, and we will "not weigh the evidence or evaluate the credibility of witnesses . . .."[6] A "dispute about a material fact is 'genuine'. . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[7] Therefore, summary judgment is appropriate if the nonmovant fails to establish facts supporting an essential element of his *prima facie* claim.[8]

GeoSouthern complains that the district court applied the incorrect standard for summary judgment herein. After discussing the traditional standard, the trial court noted our

articulation of the summary judgment standard applicable to those issues which are to be decided by the court in a nonjury trial. We observed in Nunez v. Superior Oil Co.,[9] that when "the evidentiary facts are not disputed, a court in a nonjury case may grant summary judgment if trial would not enhance its ability to draw inferences and conclusions."[10] In a nonjury trial, the judge is the ultimate trier of fact, and properly exercises judicial discretion by drawing inferences from evidence without resort to trial in instances such as are herein presented.

II. GeoSouthern's Reformation Claim:

Paragraph 3.2 of the 1991 Agreement provides that GeoSouthern must advise Chesapeake in writing that it proposes to drill on a Horizontal Prospect, and Chesapeake must notify GeoSouthern of its intent to participate "in writing . . . not less than fifteen (15) days after receipt of such notice."

In October, 1997, GeoSouthern gave Chesapeake notice of a proposal to drill the Victoria Well. Nineteen days later, Chesapeake gave GeoSouthern written notice of its election to participate in the well. GeoSouthern concedes that Chesapeake's election was timely under the literal words of the 1991 agreement, but maintains that the language of the 1991 Agreement was the result of mutual mistake. GeoSouthern seeks reformation of the 1991 Agreement and a declaratory judgment that Chesapeake's response was untimely under the reformed time requirement. The district court refused to reform the 1991 Agreement and declared Chesapeake's response timely thereunder.

Generally, an unambiguous contract "must be enforced as written, looking at the objective intent as manifested by the language used, rather than interpreting it by attempting to divine the subjective intent of the parties."[11] To obtain reformation of a contract, a party must show that: (1) the parties reached an agreement on a material term, but (2) the written contract does not reflect the parties' agreement because of a mutual mistake.[12] The party seeking reformation has the burden of proving mutual mistake,[13] and must prove

the facts and circumstances warranting reformation by clear and convincing evidence.[14]

In the present action, there is no dispute that Chesapeake's attorney inserted the "no less than fifteen days" language into an early draft of the 1991 Agreement. The 1991 Agreement was thereafter subject to extensive revision and negotiations. There is no evidence whatsoever that the parties agreed, prior to executing the 1991 Agreement, that a response would be required within fifteen days, nor is there any evidence that Chesapeake understood the "no less than" language to require a response within fifteen days. Rather, GeoSouthern presented evidence that: (a) its president read and misunderstood the provision to require a response within fifteen days; (b) Chesapeake made subsequent requests that GeoSouthern respond within fifteen days; and (c) a 1997 letter from Chesapeake to GeoSouthern stating, "in accordance with our Agreement, Chesapeake will make its election within fifteen days of receipt of such notice."

Examining the above evidence, the district court concluded that such evidence, if presented to the court in a bench trial "would not cause the Court to find the 'no less than fifteen days' provision in the 1991 [Agreement] was the result of a mutual mistake." We are compelled to agree. GeoSouthern has failed to demonstrate a genuine issue of material fact. The above evidence is not subject to factual dispute nor could it be shaped by issues of credibility. The terms of the contract are unambiguous.[15] Our review of the record, parties' briefs, and legal authority, persuades that the trial court properly granted summary judgment denying GeoSouthern's claim for reformation.[16]

III. The Victoria Well:

As noted above, the district court properly denied GeoSouthern's demand for reformation. Chesapeake properly responded no less than fifteen days after receiving notice from GeoSouthern and, as a result, is entitled to its percentage interest in the Victoria Well as declared by the district court.

IV. The Helene No. 1-RE Well:

As noted above, the parties agreed that GeoSouthern would assign rights in the Abbie Well and Neidra Well to Chesapeake, but GeoSouthern retained the right to compel reassignment of Chesapeake's rights in the excess acreage. The relevant provision declared that the "the reassignment of [Chesapeake's] . . . working interest will not reduce [Chesapeake's] (or its assigns) percentage interest in or production from any well, including increased production from subsequent operations."

GeoSouthern subsequently exercised its right of reassignment as to excess acreage in the two wells. Chesapeake executed reassignments returning to GeoSouthern "all of [Chesapeake's] right, title and interest in and to the oil and gas leases." The reassignments are expressly made subject to the 1991 Agreement, and the initial assignments.

Summary judgment is proper in cases involving the interpretation of an unambiguous contract.[17] It is undisputed that the Helene Well contains acreage which was, in part, previously included in the Abbie Well and Neidra Well. The Abbie Well and Neidra Well are properties listed under the 1991 Agreement. The development of these wells originally was proposed by Chesapeake under the 1991 Agreement, as amended by the 1993 Amendment. The assignments from GeoSouthern to Chesapeake precluded any reassignment from reducing Chesapeake's percentage interest in subsequent operations of the wells. The reassignments returned to GeoSouthern all of Chesapeake's right, title and interest in the excess acreage, but expressly were made subject to the 1991 Agreement and assignments. The district court correctly determined that taken together these contracts unambiguously established that the Abbie Well and Neidra Well excess acreage remained Properties under the 1991 Agreement when reassigned to GeoSouthern.

GeoSouthern subsequently formed the Helene Well by combining the reassigned acreage with other acreage. Under the unambiguous terms of the contracts, GeoSouthern's subsequent operations on the Helene Well produced a new

Horizontal Prospect in which Chesapeake had a right to notice and an opportunity to participate.

V. The Brangus Well:

Paragraph 4.4 of the 1991 Agreement provides that GeoSouthern has a right "to receive a reassignment of all rights to a Horizontal Prospect . . . after the well on such Horizontal Prospect becomes noncommercial . . . for a period of sixty (60) consecutive days . . .." The assignment of the Brangus1 Well from GeoSouthern to Chesapeake included this right to compel reassignment.

Chesapeake was unambiguously provided with a right to participate in the Brangus1 Well, however, the well became noncommercial for the required period and GeoSouthern compelled reassignment. The reassignment was under the existing contractual arrangement. The 1991 Agreement unambiguously includes the Brangus1 Well, and the 1993 Amendment unambiguously provides that subsequent operations which amend the existing unit "will be a new Horizontal Prospect proposal."

The district court determined that when Chesapeake reassigned its rights and interest in the Brangus1 Well the land remained subject to the 1991 Agreement. When GeoSouthern later selected that land for development it constituted a new Horizontal Prospect under the 1991 Agreement, to which Chesapeake was entitled to notice and an opportunity to participate. Our review of the record persuades that the district court correctly interpreted and applied the unambiguous contracts as they relate to the Brangus1 Well and Brangus2 Well.

The district court held that Chesapeake is entitled to notice and an opportunity to participate in other wells which GeoSouthern may propose for further development following a reassignment under paragraph 4.4. A close review of the record, and the district court's ruling, persuades that the trial court's order was sufficiently tailored to encompass only those future prospects as may necessarily fall within the purview of the unambiguous provisions of the existing

agreements, amendments and assignments between the parties.

For these reasons, the judgment appealed is AFFIRMED.

Footnotes

[1] Fluorite is an affiliate of GeoSouthern, appointed by GeoSouthern as its agent and attorney-in-fact under the 1991 Agreement. Although Fluorite is joined as a Cross-Appellee, GeoSouthern and Fluorite will be collectively referred to herein as GeoSouthern.

[2] The 1993 Agreement expired at least by December 31, 1995.

[3] *Morris v. Covan World Wide Moving, Inc., 144 F.3d 377, 380 (5th Cir. 1998).*

[4] FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).*

[5] *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).* **[**7]**

[6] Id.

[7] Id.

[8] *Celotex Corp., 477 U.S. at 322-23.*

[9] *Nunez v. Superior Oil Co. 572 F.2d 1119 (5th Cir. 1978).*

[10] *572 F.2d at 1124;* see also *In re Placid Oil Co., 932 F.2d 394, 398 (5th Cir. 1991).*

[11] *Sulzer Carbomedics v. Or. Cardio-Devices, Inc., 257 F.3d 449, 457 (5th Cir. 2001)* (citing *Sun Oil Co. v. Madeley, 626 S.W.2d 726, 731 (Tex. 1981)).*

[12] *Thalman v. Martin, 635 S.W.2d 411, 413 (Tex. 1982).*

[13] *Crockett v. Bell, 909 S.W.2d 70, 74* (Tex.App.-Houston [14th Dist.] 1995, no writ).

[14] *Oldaker v. Travelers Ins. Co., 497 S.W.2d 402, 404* (Tex.Civ.App.-El Paso 1973, no writ).

[15] *Reilly v. Ranger Mgmt., Inc., 727 S.W.2d 527, 529 (Tex. 1987)* (holding that whether a contract is ambiguous is a question of law).

[16] *Seymour v. Am. Engine Co., 956 S.W.2d 49, 58* (Tex.App.-Houston [14th Dist.] 1996, writ denied) ("A mistake by one party to an agreement, where it is not induced by the other party, will not be grounds for relief.").

[17] *Hallmark v. Port/Cooper-T. Smith Stevedoring Co., 907 S.W.2d 586, 590* (Tex.App.-Corpus Christi 1995, no writ).

CIVIL ACTION NO. H-98-0827

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

GEOSOUTHERN ENERGY CORPORATION,
Plaintiff,

vs.

CHESAPEAKE OPERATING, INC.,
Defendant.

April 15, 1999

FINAL JUDGMENT

In accordance with the Memorandum Opinion and Order issued this day, it is hereby

ORDERED that Chesapeake Operating, Inc.'s motions for summary judgment on its counterclaim (Instruments No. 18 and No. 19) are GRANTED, and GeoSouthern Energy Corporation's motion for summary judgment (Instrument No. 23) is DENIED. GEC is not entitled to reformation of the 1 991 Joint Development Agreement or to the declaratory judgment requested in its complaint.

Taxable costs are assessed against GEC.

THIS IS A FINAL JUDGMENT.

SIGNED this 15 day of April, 1999, at Houston, Texas.

DAVID HITTNER
UNITED STATES DISTRICT JUDGE

CIVIL ACTION NO. H-98-0827

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

GEOSOUTHERN ENERGY CORPORATION,
Plaintiff,

vs.

CHESAPEAKE OPERATING, INC.,
Defendant.

April 15, 1999

MEMORANDUM OPINION AND ORDER

Plaintiff GeoSouthern Energy Corporation ("GEC") sued Defendant Chesapeake Operating, Inc. ("COI") for reformation of an oil and gas contract and for a declaratory judgment interpreting the contract. COI filed a counterclaim seeking interpretation of the same and other contract provision and relief based on COI's interpretation of the various contract provisions. The case is now before the Court on COI's motion for partial summary judgment on count 1 of its counterclaim (Instrument No. 18), which is also dispositive of GEC's request for contract reformation and declaratory relief, and on COI's and GEC's cross-motions for summary judgment on counts 2, 3, and 4 of COI's s counterclaim (Instruments No. 19 and No. 23).

The Court has thoroughly reviewed the motions, the parties' legal memoranda, and the exhibits, particularly the 1991 Joint Development Agreement ("1991 JDA"), the assignments and reassignments, and the other agreements between the parties. Based on this review and the application of governing legal authorities, the Court grants COI's motion for summary judgment on Count 1 of its counterclaim, grants COI's motion for summary judgment on Counts 2-4 of the counterclaim, and denies GEC's motion for summary

judgment. For the same reasons that the Court grants summary judgment in favor of COI on Count 1 of its counterclaim, GEC is not entitled to reformation of the 1991 JDA or to the declaratory relief requested in its complaint.

I. FACTUAL BACKGROUND

In August 1991, COI, GEC, and American Fluorite, Inc. ("Fluorite")[1] entered into the 1991 JDA pursuant to which COI would use horizontal drilling technology to drill oil and gas wells on oil and gas leases owned by GEC. Both COI and GEC participated actively in the negotiation of the 1991 JDA, revising and redrafting the agreement until it reached its final form. COI was represented throughout the negotiations and revisions by an attorney; GEC's president negotiated and revised the 1991 JDA on behalf of GEC without the assistance of counsel.

The 1991 JDA provided that certain listed oil and gas "Properties" would be made available for development. If one party proposed developing all or part of a certain Property, the other party could elect to participate in the development. The land selected from the Properties for proposed wells was referred to in the 1991 JDA as a "Horizontal Prospect." Under the terms of the 1991 JDA, GEC as owner of the Properties would assign a working interest in the Horizontal Prospect to COI. If the well on the Horizontal Prospect became noncommercial for at least sixty days, GEC had a right under the 1991 JDA to receive a reassignment of COI's s rights to the Horizontal Prospect.

Although most of the Horizontal Prospects included approximately 160 acres, two of the units were significantly larger. GEC and COI agreed that these two units, Abbie #1-H and Neidra #1-H, would be assigned in full to COI, but GEC retained the right to reassignment of the excess acreage.

In 1993, the parties amended the 1991 JDA (the " 1993 Amendment"). Also in 1993, the parties entered into a separate Joint Development Agreement (the "1993 JDA") with

Union Pacific Resources Corporation. The 1993 JDA covered several, but not all, of the Properties included in the 1991 JDA.

Three separate disputes have arisen. The first dispute relates to GEC's proposal of the Victoria OL No. 1 well as a Horizontal Prospect. More than fifteen days after GEC notified COI of its designation of the Victoria well as a Horizontal Prospect, COI elected to participate. GEC argues that COI's election was untimely.

The second dispute involves the Abbie #1-H and the Neidra #1-H wells. The excess acreage from these two wells was reassigned to GEC as agreed by the parties and as provided for in the original assignment of COI's interest in the two wells. Subsequently, GEC used acreage from these two units to create a new well, the Helene No. 1-RE well. COI claims it is entitled to participate in this new well on a reduced percentage basis.

The third dispute arises from the Brangus #1-H well, which became noncommercial for at least sixty days. Under the terms of the 1991 JDA, GEC obtained a reassignment of COI's interest. GEC later developed a new well, the Brangus No. 1RE, which included the acreage from Brangus #1-H plus additional acreage. COI claims it is entitled to participate in this new well on a reduced percentage basis.

GEC filed this lawsuit addressing the Victoria well dispute. COI filed its counterclaim, addressing all three disputes. The parties filed motions for summary judgment, which are ripe for decision.

II. SUMMARY JUDGMENT STANDARD

The United States Supreme Court has held that a motion for summary judgment is properly granted unless there is evidence "on which the jury could reasonably find for the plaintiff The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of

the evidence that the plaintiff is entitled to a verdict . . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Rule 56 is an integral part of the Federal Rules of Civil Procedure, recognizing a party's right to demonstrate that certain claims have no factual basis and to have those unsupported claims disposed of prior to trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

Once the movant shows that there are no genuine issues of material fact, the burden is on the nonmovant to demonstrate with "significant probative evidence" that there is an issue of material fact warranting a trial. Texas Manufactured Housing Ass'n v. Nederland, 101 F.3d 1095, 1099 (5th Cir. 1996), cert. denied, 521 U.S. 1112 (1997). The nonmovant's burden cannot be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a scintilla of evidence. Doe v. Dallas Independent School Dist., 153 F.3d 211, 215 (5th Cir. 1998); Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994)(en banc).

The Fifth Circuit has suggested, but has not conclusively held, that a different summary judgment standard may apply to those issues which arc to be decided by the court at a nonjury trial. See United States Fidelity and Guaranty Co. v. Planters Bank & Trust Co., 77 F.3d 863, 865-66 (5th Cir. 1996) and cases cited therein. In Nunez v. Superior Oil Co., 572 F.2d 1119 (5th Cir. 1978), the Fifth Circuit stated that if "the evidentiary facts are not disputed, a court in a nonjury case may grant summary judgment if trial would not enhance its ability to draw inferences and conclusions." Id. at 1124. "Although, as always, a district court must be aware that assessments of credibility come into sharper focus once live witnesses are heard, Nunez establishes that even at the summary judgment stage a judge in a bench trial has the limited discretion to decide that the same evidence, presented to him or her as trier of fact in a plenary trial, could not possibly lead to a different result." Matter of Placid Oil Co., 932 F.2d 394, 398 (5th Cir. 1991).

III. THE VICTORIA OL NO. 1 WELL

A. The Applicable 1991 JDA Provision

Paragraph 12 of the 1991 JDA provides in pertinent part that GEC must advise COI in writing it GEC proposes to drill on a Horizontal Prospect and COI must notify GEC "in writing whether Chesapeake will participate and the amount of such participation no less than fifteen (15) days after receipt of such notice." 1991 JDA, Exh. A to Instrument No. 18, at ¶ 3 .2 (emphasis added).

B. The Dispute

On October 10, 1997, GEC gave COI written notice of a proposal to drill the Victoria OL No. 1 well. On October 29, 1997, COI gave GEC written notice of its election to participate in the well GEC took the position that the October 29 response was untimely.

GEC concedes that it received COI's s response "no less than fifteen days" after COI received notice of GEC's proposal to drill the Victoria well. GEC also concedes that COI's response was timely under the language in the 1991 JDA. GEC argues, however, that the language in the 1991 JDA was the result of a mutual mistake. GEC seeks reformation of the 1991 JDA and a declaratory judgment that COI's response was untimely under the reformed time requirement.

C. Analysis

A party to a contract may obtain reformation of the contract if he proves that (1) the parties reached an agreement on a material term, but (2) the written contract does not reflect the parties' agreement because of a mutual mistake. Thalman v. Martin, 635 S.W.2d 411, 413 (Tex. 1982). The party seeking reformation has the burden of proving mutual mistake. Crockett v. Bell, 909 S.W.2d 70, 74 (Tex. App. – Houston [14th Dist.] 1995, no writ). The party seeking reformation must prove the facts and circumstances

warranting reformation by clear and convincing evidence. Oldaker v. Travelers Insurance Co., 497 S.W.2d 403, 404 (Tex. Civ. App. – El Paso 1973, no writ).

In this case, it is undisputed that COI's attorney inserted the "no less than fifteen days" language into an early draft of the 1991 JDA. Thereafter, the 1991 JDA was subjected to a "typical revision and negotiating process." Bishop Depo., Exh. B to Instrument No. 18, p. 22. GEC's representative read the language, but thought it "meant you had to respond within fifteen days." Id. at 24. There is no evidence that GEC and COI agreed prior to executing the 1991 JDA that the parties would be required to respond within fifteen days. There is also no evidence that COI read the 1991 JDA and similarly misunderstood the "no less than fifteen days" language or that COI knew that GEC misunderstood the provision. Instead, GEC's evidence consists of Bishop's admission that he read and misunderstood the 1991 JDA provision, COI's subsequent requests that GEC respond to COI proposals within fifteen days, and a July 1, 1997 letter from COI to GEC stating, "[i]n accordance with our Agreement, Chesapeake will make its election within fifteen days of receipt of such notice." Letter, Exit H to Instrument No. 25. This evidence, if presented to the Court in a bench trial, would not cause the Court to find that the "no less than fifteen days" provision in the 1991 JDA was the result of a mutual mistake. See GXG. Inc. v. Texacal Oil & Gas, 977 S.W.2d 403 , 426-27 (Tex. App. – Corpus Christi 1998, review denied) (no mutual mistake where party had opportunity to review document before signing it and "even a cursory inspection would have immediately revealed" the alleged mistake); Seymour v. American Engine Co., 956 S.W.2d 49, 58 (Tex. App. – Houston [14th Dist.] 1996, writ denied) ("A mistake by one party to an agreement, where it is not induced by the other party, will not be grounds for relief.").

D. Conclusion

The language in the 1991 JDA provides clearly and unambiguously that the response is due "no less than fifteen

days" after receiving notice of the proposal for a well on a Horizontal Prospect. GEC has failed to present evidence which would result in a finding by the Court following a bench trial that this language is the result of a mutual mistake and that the 1991 JDA should be reformed to provide that the response is due "within fifteen days." COI is entitled to summary judgment that its election to participate in the Victoria OL No. 1 Well was timely and, as a result, COI is entitled to its percentage interest in the Victoria OL No. 1 Well as provided for under the 1991 JDA.

IV. THE HELENE NO. 1-RE WELL

A. The Applicable Contract Provisions

As discussed above, the parties agreed that GEC would assign rights in the Abbie #1-H and the Neidra #1-H to COI, but would retain the right to require COI to reassign its rights in the excess acreage to GEC. In accordance with this agreement, GEC executed a Deed, Assignment, Bill of Sale and Conveyance relating to the Abbie #1-A well (Exh. F to Instrument No. 19) and to the Neidra #1-H well (Exh. G to instrument No. 19) (the "Assignments"). The Assignments include the reservation of OEC's right of reassignment. The reassignment provision reflects the agreement that the "reassignment of COI's . working interest will not reduce COI's (or its assigns) percentage interest in or production from any well, including increased production from subsequent operations."

GEC subsequently exercised its right of reassignment. COI executed an "Assignment of Oil, Gas and Mineral Leases" (the "Reassignments") as to the Abbie # 1-H well (Exh. L to Instrument No. 19) and as to the Neidra #1-H well (Exh. K to Instrument No. 19). The Reassignments return to GEC "all of [COI's] right, title and interest in and to the oil and gas leases" and are "subject to" the 1991 JDA and the Assignments.

The 1993 Amendment provides in pertinent part that "operations subsequent to the initial drilling operations

requiring an amendment to the existing unit will be a new Horizontal Prospect proposal." (Exh. H to Instrument No. 19, ¶ 3.1).

B. Analysis

"When a case involves the interpretation of a contract and the contract is found to be unambiguous, a summary judgment is proper." Hallmark v. Port/Cooper-T. Smith Stevedoring Co., 907 S.W.2d 586, 590 (Tex. App. – Corpus Christi 1995, no writ). Whether a contract is ambiguous is a question of law. Reilly v. Rangers Management, Inc., 727 S.W.2d 527, 529 (Tex. 1987). If a contract can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law. Coker v. Coker, 650 S.W.2d 391, 392 (Tex. 1983); Coniveau v. 3005 Investment Corp., 697 S.W.2d 766, 767 (Tex. App. – Corpus Christi 1985, writ ref'd n.r.e.). Under Texas law, the court must look to the parties' objective, not subjective, intent. U.S. for Use and Benefit of Straus Systems, Inc. v. Associated Indemnity Ca., 969 F.2d 83, 85 (5th Cir. 1992). Whether certain or undisputed facts establish a contract is a question of law for the court to decide. Paniagua v. City of Galveston, 995 F.2d 1310, 1314 n.2 (5th Cir. 1993).

The Helene No. 1-RE contains, in part, acreage which was previously excess acreage in the Abbie #1-H and Neidra #1-H property. It is undisputed that the Abbie and Neidra properties are listed as Properties under the 1991 JDA. The development of these wells was originally proposed by COI under ¶ 3.1 of the 1991 JDA, as amended by the 1993 Amendment to provide that subsequent operations which amend the existing unit are treated as new Horizontal Prospect proposals under the 1991 JDA. The Assignments preclude any reassignment from reducing COI percentage interest in subsequent operation of the wells. The Reassignments, while generally returning to GEC "all of [COI's] right, title and interest" in the leases, are made expressly subject to the 1991 JDA and the Assignments.

COI, in the Reassignments, returned to GEC all interest in the Abbie and Neidra excess acreage which GEC previously assigned to COI. The 1991 JDA, the 1993 Amendment, the Assignments and. the Reassignments, read together, establish that the Abbie #1-H and Neidra #1-H excess acreage, when reassigned to GEC, remained Properties under the 1991 JDA.[2] GEC subsequently drilled the excess acreage from the Abbie and Neidra properties, which were originally proposed as Horizontal Prospects by COI, as the Helene No. 1-RE. This subsequent operation of the Abbie and Neidra properties in an amended configuration is treated as a new Horizontal Prospect in which COI has a right to participate. Any other interpretation of the documents would reduce COI's percentage interest in the Abbie and Neidra wells in violation of the Assignments and would fail to comply with the 1993 Amendment requirement that subsequent operations be treated as new Horizontal Prospects.

C. Conclusion

Upon the reassignment of the excess acreage from the Abbie # 1-H and the Neidra #1-H Horizontal Prospects, the land remained Properties subject to the 1991 JDA. The Abbie #1-H and the Neidra #1-H Properties, when selected by GEC for further development, were new Horizontal Prospects under the 1991 JDA. COI is entitled to notice and the opportunity to participate in the Horizontal Prospect currently referred to as Helene No. 1-RE. Well, in a proportionately-reduced percentage based on the inclusion of the Abbie #1-H and the Neidra #1-H Properties.

V. THE BRANGUS NO. 1RE WELL

A. The Applicable Contract Provisions

Paragraph 4.4 of the 1991 JDA provides that GEC has the right "to receive a reassignment of all rights to a Horizontal Prospect . . . after the well on such Horizontal Prospect becomes noncommercial (operating costs and overhead exceed the Applicable Net Revenue Interest) for a period of

sixty (60) consecutive days, uninterrupted by any reworking or further horizontal drilling operations thereon." The Deed, Assignment, Bill of Sale and Conveyance (the "Brangus Assignment") from GEC to COI included this right to require reassignment of a well which becomes noncommercial for more than sixty days. Brangus Assignment, Exh. H to Instrument No. 26. Specifically, the Brangus Assignment provides that, upon request, "COI (or its assigns) will furnish to Grantor an assignment relinquishing all right, title and interest (being a 56.25% working interest, and 40.50% revenue interest) in the well and personal property as set out above." Id.

After the Brangus #1-H well became noncommercial for the required period, GEC exercised its right of reassignment. COI executed an Assignment, Bill of Sale and Conveyance (Exh. I to Instrument No. 26) returning to GEC the rights previously assigned (the "Brangus Reassignment"). The Brangus Reassignment is expressly made subject to the "terms and conditions" of the 1991 JDA, as amended.

B. Analysis

As discussed above, unambiguous contracts are construed by the Court as a matter of law. Coker, 650 S.W.2d at 392. The Brangus Reassignment unambiguously provides that it is subject to the 1991 JDA, as amended. The 1991 JDA unambiguously includes the Brangus property, and the 1993 Amendment unambiguously provides that subsequent operations which amend the existing unit. "will be a new Horizontal Prospect proposal." The 1991 JDA unambiguously provides that COI has a right to participate in Horizontal Prospects. This unambiguous language is not affected by COI's returning to GEC the interests in the Brangus #1-H property previously assigned to COI subject to the 1991 JDA.

C. Conclusion

COI reassigned its rights and interest in the Brangus #1-H Horizontal Prospects under ¶ 4.4 of the 1991 JDA, but the

land remained Property subject to the 1991 JDA. When GEC selected the Brangus #1-H land for further development, this constituted a Horizontal Prospect under the 1991 JDA, as amended. COI is entitled to notice and the opportunity to participate in the Horizontal Prospect referred to as Brangus No. 1RE, in a proportionately-reduced percentage based on the inclusion of the Brangus #1-H Property. Similarly, COI is entitled to notice and the opportunity to participate in other wells which GEC may redrill after the property has been reassigned under ¶ 4.4.

VI. CONCLUSION AND ORDER

Based on the foregoing, the Court concludes that COI is entitled to participate in the Victoria OL No. 1 Well, the Helene No. 1-RE Well, the Brangus No. 1RE Well, and other wells which were the result of Horizontal Prospects under the 1991 JDA and were reassigned to GEC in accordance with the provision in the 1991 JDA regarding wells which are noncommercial for at least sixty days. Accordingly, it is hereby

ORDERED that COI's motion for summary judgment on Count 1 of its counterclaim (Instrument No. 18) is GRANTED, COI's motion for summary judgment on Counts 2-4 of the counterclaim (Instrument No. 19) is GRANTED, and GEC's motion for summary judgment (Instrument No. 23) is DENIED. GEC is not entitled to reformation of the 1991 JDA or to the declaratory judgment requested in its complaint.

Final judgment will be issued by separate order.
SIGNED this 15 day of April, 1999, at Houston, Texas.

DAVID HITTNER
UNITED STATES DISTRICT JUDGE

Footnotes

[1] Fluorite, an affiliate of GEC, appointed GEC as its agent and attorney-in-fact under the 1991 JDA. Although Fluorite has

been joined as a Third-Party Defendant, the Court will refer to Fluorite and GEC collectively as "GEC."

[2] GEC argues, in connection with the Abbie/Neidra Properties and the Brangus well discussed below, that the Properties could not have remained subject to the 1991 JDA after reassignment because the 1993 JDA terminated the 1991 JDA. Paragraph 7.2 of the 1993 JDA provides that the 1991 JDA is terminated "as to lands outside the Joint Development Area except for the wells and units listed on Exhibit 'F' attached hereto." 1993 JDA, Exh. F to Instrument No. 26. Exhibit F to the 1993 JDA lists the Abbie #1-H, the Neidra #1-H, and the Brangus #1-H properties. Consequently, the 1991 JDA did not terminate as to these Properties.

No. 01-20249

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GEOSOUTHERN ENERGY CORP;
Plaintiff - Counter Defendant - Appellant

and

AMERICAN FLOURITE INC,
Counter Defendant - Appellant

v.

CHESAPEAKE OPERATING INC,
Defendant - Counter Claimant - Appellee

February 1, 2002, Filed

JUDGES:

Before POLITZ, SMITH and BARKSDALE, Circuit Judges.

OPINION:

ON PETITION FOR REHEARING

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

Henry A. Politz

United States Circuit Judge

CIVIL ACTION NO. H-98-0827

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

GEOSOUTHERN ENERGY CORPORATION,
Plaintiff,

vs.

CHESAPEAKE OPERATING, INC.,
Defendant.

July 27, 1999

AMENDED FINAL JUDGMENT

In accordance with the Memorandum Opinion and Order issued. April 15, 1999 and the Order issued July 20, 1999, it is hereby

ORDERED that Chesapeake Operating, Inc.'s motions for partial summary judgment on its counterclaim (Instruments No. 18 and 19) are GRANTED, and GeoSouthern Energy Corporation's motion for summary judgment (Instrument No. 23) is DENIED.

GeoSouthern Energy Corporation is not entitled to reformation of the 1991 Joint Development Agreement or to the declaratory judgment requested in its complaint.

Chesapeake Operating Inc. is entitled to the declaratory judgment requested in its counterclaim; however, the Court declines to calculate and award monetary relief at this time. Chesapeake Operating, Inc. is entitled to the following interests from inception in the disputed wells:

Helene No. I RE Well:	
Cost Participation ("Cost")	39.63 0277%
Working Interest ("WI")	29.722708%

Net Revenue Interest ("NRI")	21.400350%
<u>Victoria OL No 1 Well:</u>	
Cost Participation Before Payout ("BPO Cost")	31.202435%
Working Interest Before Payout ("BPO WI")	27.735498%
Net Revenue interest Before Payout ("BPO NRI")	20.801623%
Cost Participation After Payout ("APO Cost")	24.268560%
Working interest Alter Payout ("APO WI")	24.268560%
Net Revenue Interest After Payout ("APO NRI")	18.201420%
<u>Brangus No. 1-RE Well:</u>	
Cost Participation ("Cost")	40.15 8979%
Working Interest ("WI")	30.119235%
Net Revenue Interest ("NRI")	21.6858 49%

Chesapeake Operating inc. is entitled to notice and the opportunity to participate in future wells that GeoSouthern Energy Corporation may redrill after the property has been reassigned under ¶4.4 of the 1991 Joint Development Agreement.

Chesapeake Operating Inc. shall recover its reasonable attorney's fees in the amount of $75,000.

Chesapeake Operating Inc.'s request for pre-judgment interest is DENIED. Taxable costs are assessed against GeoSouthern Energy Corporation

THIS IS A FINAL JUDGMENT.
SIGNED this 27 day of July 1999 at Houston, Texas

DAVID HITTNER
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUN 5 2002
OFFICE OF THE CLERK

No. 01-1636

IN THE

Supreme Court of the United States

GEOSOUTHERN ENERGY CORP.
and AMERICAN FLUORITE, INC.,

Petitioners,

v.

CHESAPEAKE OPERATING, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Chesapeake Operating, Inc., has no parent company and the only publicly held company which owns 10% or more of its stock is Chesapeake Energy Corporation.

Respondent Chesapeake Operating, Inc. respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the Fifth Circuit Court of Appeals in this case.

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari must be denied because the record and decision below do not raise the question presented. Although the district court and the court of appeals referred to the standard of review challenged by Petitioners, it was not necessary to the decisions of the lower courts.

The district court granted summary judgment on three separate claims. The challenged standard of review was mentioned in connection with only one of those claims. Even with respect to that claim, the district court did not apply the challenged standard of review in the manner suggested by Petitioners.

The standard of review challenged by Petitioners is that where "the evidentiary facts are not disputed, a court in a non-jury case may grant summary judgment if trial would not enhance its ability to draw inferences and conclusions." *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1124 (5th Cir. 1978). This standard of review has not been well developed even in the Fifth Circuit. In *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265 (5th Cir.), *cert denied*, 484 U.S. 851, 108 S. Ct. 152, 98 L. Ed. 2d 107 (1987), the Fifth Circuit noted that it had "arguably articulated" a separate standard for review of summary judgments in non-jury cases. 812 F.2d at 273 n.15. In *In re Placid Oil Co.*, 932 F.2d 394 (5th Cir. 1991), the Fifth Circuit declined to "decide definitively" whether a different summary judgment standard of review

applied in non-jury cases, because a district court has "somewhat greater discretion" in determining the weight to be accorded evidence in a non-jury case. 932 F.2d at 397. Indeed, the district court here noted that the Fifth Circuit "has suggested, but has not conclusively held, that a different summary judgment standard may apply" in a nonjury trial. Pet., App. at 15a. Thus, the dimensions of the very standard that Petitioners challenge are unclear. This case does not present a clearly defined question for this Court and, therefore, is inappropriate for review.

There is also substantial doubt as to whether the district court and the court of appeals even applied the challenged standard of review. The question before the district court was a simple one: did GeoSouthern produce evidence of the elements of a claim for reformation based on an alleged mutual mistake? As both the court of appeals and the district court recognized, the elements of a reformation claim under Texas law are: (1) an agreement as to a material term; and (2) a mutual mistake that caused the agreement to not be reflected in the written contract. Pet., App. at 5a, 16a.

In support of its motion for summary judgment, Respondent produced evidence disproving both elements of reformation. In order to avoid summary judgment, Petitioners were then obliged to produce evidence establishing the existence of a genuine issue of material fact on both elements. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1355, 89 L. Ed. 2d 538 (1986). Petitioners failed entirely to present "specific facts showing that there is a *genuine issue for trial*." *Id.*, 106 S. Ct. at 1356. Instead, Petitioners presented deposition testimony that GeoSouthern's president misunderstood the agreement, and evidence of subsequent conduct by Respondent that was inconsistent with the agreement.

The district court observed that Petitioners' evidence, if presented in a bench trial, would not cause the court to reach a different result. However, there is no indication that the district court reached this conclusion because it drew any inferences or weighed the evidence in any manner different than the court would have done under the traditional summary judgment standard. The district court and the court of appeals recognized that the agreement was unambiguous and took all of the evidence — including Petitioners' — as undisputed. Pet., App. at 6a, 17a. The district court simply held that Petitioners' evidence was not sufficient to create a genuine issue of material fact.

Contrary to Petitioners' suggestion, the district court was not called upon to weigh the evidence or make credibility determinations. As the court of appeals observed, "The above evidence is not subject to factual dispute nor could it be shaped by issues of credibility." Pet., App. at 6a. The record does not establish that the district court applied a standard other than that articulated in FED. R. CIV. P. 56 in granting summary judgment, or that the result would have been different under the two standards.

There can be no dispute that the evidence Petitioners submitted did not create a genuine issue of material fact on either element of their claim. The president of GeoSouthern's professed misunderstanding of the effect of the "not less than" language does not constitute proof of a mutual mistake. *Sun Oil Co. v. Bennett*, 125 Tex. 540, 84 S.W.2d 447 (1935). Under Texas law, a mistake by one party that is not induced by the other party does not constitute a basis for reformation. *Seymour v. American Engine & Grinding Co.*, 956 S.W.2d 49, 58 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *Coronado Transmission Co. v. O'Shea*, 703 S.W.2d 731, 735-36 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

Petitioners' evidence of Respondent's subsequent conduct did not create a genuine issue of *material* fact as to whether the parties made a prior agreement different than that expressed in the executed contract, or that they made a mistake in reducing the agreement to writing. "The ultimate question in a reformation case . . . is whether a mutual mistake was made. The critical period for purposes of analysis of that question is the period during which the proposed agreement at issue was reduced to writing and reviewed prior to signing." *Phillips Oil Co.*, 812 F.2d at 275. The only evidence that is of consequence in a mutual mistake case is "objective circumstances surrounding execution" of the writing. *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990). Evidence of the parties' conduct *after* a document is signed is not logically relevant because it does not make the existence of a prior agreement or a mistake in drafting more or less likely.

Petitioners presented no evidence of the required elements of their reformation claim. The evidence they presented in opposition to the motion for summary judgment was legally irrelevant, *i.e.*, was of no legal significance to the existence of either element of the reformation claim. As the court of appeals held, Petitioners simply "failed to demonstrate a genuine issue of material fact." Pet., App. at 6a.

Whether the district court "weighed" that evidence is immaterial because the nature of the evidence was such that it made no difference to the outcome of the case. There is also no indication in the record that the district court drew any inferences from any of the evidence. Therefore, it is impossible for Petitioners to demonstrate that they were injured even if the district court did apply the challenged standard of review.

This case presents, at best, a largely hypothetical issue as to the propriety of a standard of summary judgment review that probably was not applied and, if applied, certainly would not change the outcome. Therefore, there is no basis for review by this Court.

CONCLUSION

For the reasons stated, Respondent respectfully urges that the petition for writ of certiorari be denied.

Respectfully submitted,

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